

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

DETERMINATION

ANDREW P. FLEMING,

a Justice of the Hamburg Village Court,
Erie County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission
Mohun & Killelea (by Michael M. Mohun) for the Respondent

The respondent, Andrew P. Fleming, a Justice of the Hamburg Village Court, Erie County, was served with a Formal Written Complaint dated June 5, 2013, containing one charge. The Formal Written Complaint alleged that respondent acted as

an attorney for an alleged rape victim and her family notwithstanding that he had presided over proceedings in the underlying criminal case. Respondent filed an answer dated June 26, 2013.

On July 29, 2013, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On September 19, 2013, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Hamburg Village Court, Erie County, since 2006. His current term expires on April 7, 2014. He was admitted to the practice of law in New York in 1986.

2. From in or about March 2010 through in or about September 2010, respondent acted as attorney for a rape victim and her family, notwithstanding that respondent had presided over prior proceedings in the underlying criminal case.

3. On June 9, 2009, respondent issued an arrest warrant for Clarence M. Justice on charges of Rape in the Third Degree (Penal Law §130.25[2]) and Endangering the Welfare of a Child (Penal Law §260.10[1]). On June 11, 2009, respondent arraigned Mr. Justice, recalled the arrest warrant, issued an order of protection on behalf of the victim, who was then 15 years old, and set bail for Mr. Justice in the amount of \$2,500 cash or \$10,000 bond. Respondent adjourned the case to August 5,

2009.

4. On July 22, 2009, Mr. Justice's employer requested the records of his criminal case from the court. Respondent approved sending the public records, with the victim's name redacted, to the employer.

5. On August 5, 2009, Mr. Justice's attorney failed to appear in court, and respondent adjourned the case to August 12, 2009.

6. Subsequently, Mr. Justice waived a preliminary hearing, and the case was held for the grand jury. On or about August 14, 2009, the Hamburg Village Court was divested of jurisdiction over Mr. Justice's case.

7. Respondent has been acquainted with the family of Mr. Justice's victim since approximately the late 1990s. Both families were members of the Willow Bend Club, where their children participated on swim teams.

8. In approximately March of 2010, the victim's father telephoned respondent for information about various legal aspects of Clarence Justice's criminal case, which was pending in Erie County Supreme Court. Respondent provided the father with information about the criminal justice system and legal procedures in Mr. Justice's case.

9. Between approximately March 2010 and late July 2010, respondent engaged in several additional telephone calls with the victim's father and again provided information about the legal proceedings in Mr. Justice's case. The victim's father told respondent that members of Mr. Justice's family and other supporters were harassing the

15-year-old victim.

10. In or about July 2010, while Mr. Justice was on trial in Supreme Court, Erie County, respondent spoke with Lauren A. Gauthier, the prosecuting Assistant District Attorney, about allegedly harassing conduct at the courthouse by Mr. Justice's family members and supporters towards the victim.

11. On July 16, 2010, Mr. Justice was convicted of four class E felonies: two counts of Rape in the Third Degree (Penal Law §130.25) and two counts of Criminal Sexual Act in the Third Degree (Penal Law §130.40). On September 29, 2010, Mr. Justice was sentenced to four years in prison for each count.

12. After the conclusion of the *Justice* trial but prior to Mr. Justice's appearance for sentencing, respondent telephoned and spoke with the judge presiding over the case about the alleged conduct of the Justice family and their supporters during the trial.

13. In or about late July 2010, respondent met with the victim and her family at his law office. Respondent discussed with them legal action that could be initiated in response to the allegedly harassing conduct of members of the Justice family and their supporters.

14. On or about July 27, 2010, respondent sent a letter on his law office stationery to the home of a Justice family member and a friend of the family member who taught at the victim's school. Respondent stated in part:

We have been retained by the [victim's] family to pursue a civil suit against Clarence Justice and to block any further

harassment of [the victim] by either you, your families or your friends. We will be preparing the suit papers against Mr. Justice in the near future. This letter is sent though to note our representation and to demand that you *Cease and Desist* from any further harassment of our clients. [Emphasis in original.]

Respondent sent the letter notwithstanding that he was prohibited from representing the victim in a civil suit against Mr. Justice by section 100.6(B)(2) of the Rules Governing Judicial Conduct.

Additional Factors

15. Neither respondent nor anyone in his firm ever requested or accepted any fee or compensation for any services concerning the matter identified in this Statement.

16. Respondent has been cooperative with the Commission throughout its inquiry.

17. In his seven years on the bench, respondent has not been previously disciplined for judicial misconduct. He regrets his failure to abide by the Rules in this instance and pledges to conduct himself in accordance with the Rules for the remainder of his term as a judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.4(A)(3) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written

Complaint is sustained, and respondent's misconduct is established.

Every judge is required to conduct his or her extra-judicial activities so as to minimize the risk of conflict with judicial obligations (Rules, §100.4[A][3]) and to avoid even the appearance of impropriety (Rules, §100.2). Pursuant to these ethical standards, a part-time judge who practices law must maintain a strict separation between the exercise of judicial duties and the judge's private practice of law.

As a part-time judge permitted to practice law, respondent violated his ethical obligations by acting as an attorney for an alleged rape victim and her family after presiding over proceedings in the underlying criminal case. Having issued an arrest warrant, arraigned the defendant, set bail and issued an order of protection on behalf of the alleged victim, respondent should have recognized that it was improper for him to represent the victim in any related matters. Instead, after his court was divested of jurisdiction over the criminal case, he acted as her lawyer when she was allegedly harassed by the defendant's supporters, speaking to the district attorney and contacting the sentencing judge on her behalf, and sending a "cease and desist" letter to the alleged harassers – acts that clearly constituted the practice of law. Respondent's letter also stated that he had been retained to pursue a civil suit against the defendant, a proceeding that would be inextricably intertwined with the matter over which he had presided. While the record does not indicate whether such an action was filed, respondent should not have threatened to commence a proceeding in which he was ethically barred from acting as a lawyer (*see* Rule 100.6[B][2]; *see also* Adv Op 95-52 [lawyer-judge may not represent

the wife in a divorce action when the judge had granted an order of protection to the wife against her husband]).

Even if respondent was motivated by a sincere desire to help the young victim of a crime whose family he knew, the ethical rules precluded him from acting as her advocate. By undertaking representation of the victim in the circumstances presented, he conveyed the appearance of using his judicial position and information gleaned in his official capacity to benefit his practice of law. *See Matter of Sims*, 61 NY2d 349, 355 (1984) (by signing orders releasing defendants who later retained the judge's husband to represent them in the matters, judge created an appearance of impropriety, conveying the "unmistakable impression" of using her judicial office to benefit her husband's law practice). As respondent has acknowledged, such an appearance is inconsistent with the ethical mandates notwithstanding that he did not seek or receive any compensation for his legal services.

Every lawyer-judge has a responsibility to scrupulously adhere to the applicable restrictions on the practice of law in order to avoid conduct that may create an appearance of impropriety and impugn the integrity and independence of the judiciary.

We note that respondent has acknowledged the impropriety of his conduct and pledges to conduct himself in accordance with the Rules in the future.

By reason of the foregoing, the Commission determines that the appropriate disposition is admonition.

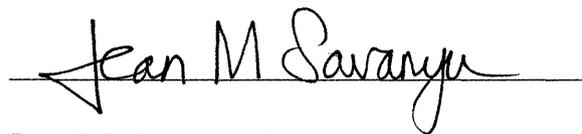
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen,

Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: September 30, 2013

A handwritten signature in cursive script, reading "Jean M. Savanyu", is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct